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Daniel Kanstroom

*Boston College Law School*, [kanstroo@bc.edu](mailto:kanstroo@bc.edu)

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# Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions

by Daniel Kanstroom\*

*All that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people.*<sup>1</sup>

*[I]gnorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments.*<sup>2</sup>

*A policy granting greater security of residence to long-term immigrants who have chosen to live for a long period in the host country is preferable to the use of expulsion, which is inhuman and senseless.*<sup>3</sup>

## I. INTRODUCTION

Substantial interior immigration enforcement will undoubtedly continue in the United States, whether or not the legislative and executive branches can craft a legalization program.<sup>4</sup> Though some enforcement is surely necessary, the system's continuity will also be due in part to inertia. The size of the current enforcement system is stunning, affecting many millions of noncitizens and removing many hundreds of thousands annually.<sup>5</sup>

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\* Professor of Law, Thomas F. Carney Distinguished Scholar, and Director, Human Rights Program, Boston College Law School. This Article is dedicated to Dave Martin from whose exemplary collegiality and practical wisdom I have learned more than I can describe, even—indeed especially—as we have sometimes disagreed. Thanks, too, to the student organizers of this Symposium, to Dean Vincent Rougeau, and to my colleagues, Paulo Barrozo, Jessica Chicco, Mary Holper, Kari Hong, and Katie Young, for helpful suggestions.

<sup>1</sup> JOHN STUART MILL, *ON LIBERTY*, ch. 1.6 (1859).

<sup>2</sup> Declaration of the Rights of Man and of the Citizen (Fr. 1789).

<sup>3</sup> Eur. Consult. Ass., *Non-Expulsion of Long-Term Immigrants*, Doc. No. 8986 (2001), available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=9216&Language=en>.

<sup>4</sup> By interior enforcement, I mean, simply, those mechanisms that are utilized on U.S. soil, including at ports of entry. I do not mean to imply that other forms of enforcement are not important or in need of change. For example, the doctrine of consular non-reviewability and the relative lack of rights of deportees post-departure remain very serious problems.

<sup>5</sup> One recent study has concluded that ICE and CPB combined for some six million formal removals during the ten-year period from 2003 to 2013. This does not include many millions of informal “returns.” See Marc Rosenblum & Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change*, MIGRATION POLICY INST. (Oct. 2014), <http://migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>. For a very useful consideration of costs and budget issues, see COMMITTEE ON ESTIMATING COSTS OF IMMIGRATION ENFORCEMENT IN THE DEPARTMENT OF JUSTICE, NAT’L RESEARCH COUNCIL, *BUDGETING FOR IMMIGRATION ENFORCEMENT: A PATH TO BETTER PERFORMANCE* (2011), available

Equally impressive are its costs and its complexity. One recent study aptly described the system as “formidable machinery,” involving a “complex, cross-agency system that is interconnected in an unprecedented fashion.”<sup>6</sup> Spending on immigration enforcement was about \$18 billion in FY 2012, and has totaled some \$186 billion since 1986.<sup>7</sup> If we add to this federal spending an extensive pattern of recent state and local involvement in immigration enforcement, the costs, effects, and tentacle-like reach of the system become truly impressive. Moreover, its political salience is clear, as enforcement is a linchpin of discussions over comprehensive immigration reform. Virtually none of this is likely to change, absent much more dramatic re-structuring than has yet been proposed. It *should* change, however, as the system needs major recalibration. This is a propitious moment for serious rethinking.

This Article is a foray into deep waters. Its main purpose is to sketch and to justify a better framework for interior immigration enforcement. Such a framework should satisfy two major goals. First, it should engage meaningfully with “public order,” operational efficiency, and basic human rights. Put another way, it must be both effective and legitimate. Second, it should govern the major aspects of interior immigration enforcement architecture: prosecutorial discretion, statutory/regulatory structure, adjudicative interpretation, and adjudicative discretion.<sup>8</sup> The Article’s conclusion is that the best way to accomplish this is, first, to dramatically de-emphasize immigration enforcement against long-term legal residents; and second, to take the notions of proportionality and graduated sanctions seriously in structural—rather than in discretionary—ways.

## II. FRAMING: TOWARDS SMART(ER) ENFORCEMENT

It has long been obvious that immigration enforcement aims at three primary goals: prevention of unauthorized entrants, removals of various categories of noncitizens, and deterrence of future immigration law

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at <http://www.nap.edu/catalog/13271/budgeting-for-immigration-enforcement-a-path-to-better-performance> [hereinafter BUDGETING FOR IMMIGRATION ENFORCEMENT].

<sup>6</sup> Doris Meissner et al., *Immigration Enforcement in the United States: the Rise of a Formidable Machinery*, MIGRATION POLICY INST. (Jan. 2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

<sup>7</sup> *Id.*

<sup>8</sup> For a full discussion of the latter two concepts, see Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 818 (1997); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006).

violations.<sup>9</sup> These goals are not now—nor have they ever been—fully achievable. Thus, an underlying *leitmotif* of immigration enforcement is analogous to national security and criminal law: enforcement may reduce and control perceived problems; it cannot eliminate them. The Department of Homeland Security (“DHS”), for example, recognizes that it seeks “to manage,” not to seal the border.<sup>10</sup>

The breadth of immigration enforcement goals and the magnitude of immigration control in practice have long inspired various types of conceptual framing. Some rather ominous models appear tragi-comic in retrospect, especially as to rights protections and depictions of deportees. For example, Timothy Pickering, a main enforcer of the dreadful 1798 Alien and Sedition Acts, once said, “[H]e must be ignorant indeed who does not know that the Constitution was established for the protection and security of American citizens, and not of intriguing foreigners.”<sup>11</sup> Mitchell Palmer, the Attorney General who led infamous deportation raids in the early twentieth century against alleged anarchists and radicals, once described in congressional testimony, “the sly and crafty eyes of many of [the deportees]” from which he saw “cupidity, cruelty, insanity, and crime.” He went on to note “their lopsided faces, sloping brows, and misshapen features” in which he recognized, “the unmistakable criminal type.”<sup>12</sup>

More recent frames have generally endeavored to be more nuanced and balanced.<sup>13</sup> The 1997 Report to Congress of the U.S. Commission on Immigration Reform, for example, used the concept of “credibility” to describe its enforcement vision, stating: “A credible immigration system requires the effective and timely removal of aliens determined through constitutionally-sound procedures to have no right to remain in the United States.”<sup>14</sup> The Obama Administration has developed a similar framework colloquially called “smart enforcement.” Its basic priorities have been the

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<sup>9</sup> BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 41. There are, to be sure, sub-goals such as retribution, crime control, national security, etc.

<sup>10</sup> Meissner et al., *supra* note 6, at 3.

<sup>11</sup> Letter from Timothy Pickering to John Adams (Sept. 29, 1798), in 3 OCTAVIUS PICKERING & CHARLES W. UPHAM, THE LIFE OF TIMOTHY PICKERING 475 (1873).

<sup>12</sup> Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post Among Others Before the H. Comm. on Rules, 66th Cong. 27 (1920) (statement of A. Mitchell Palmer, Att’y Gen. of the United States).

<sup>13</sup> See generally DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA (2012) (describing various historical models).

<sup>14</sup> COMMISSION ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 126 (1997). The commission focused to a great degree on absconders, but also suggested “establishing priorities and numerical targets” *Id.* at 131.

removal of noncitizens convicted of crime, the removal of recent illegal entrants, and the removal of noncitizens who have disobeyed formal immigration orders, most particularly so-called “absconders.”<sup>15</sup> The first part of this approach—criminal enforcement—has been a strong component since the start of “smart enforcement.” Indeed, the percentage of interior removals based on criminal convictions has risen dramatically, from 53% in FY 2008 to 87% in 2013.<sup>16</sup> A total of 216,810 people removed by U.S. Immigration and Customs Enforcement (“ICE”) in FY 2013 had been convicted of a crime.<sup>17</sup> However, the nature of those crimes (many have been quite minor) and the mechanisms used to catch people (i.e., the Secure Communities program) have raised serious concerns, a point to which I return below.

The etymology of “smart enforcement” illustrates the evolving priorities and involvement of both immigrant advocates and the Obama Administration. In the immigration context, the phrase may be traced to Frank Sharry, then director of the National Immigration Forum, an advocacy group. Sharry used it in response to Representative Tom Tancredo (R-CO), who had criticized Bush Administration immigration reform proposals as a “mockery of the idea of rule of law.”<sup>18</sup> Sharry responded that national security required a combination of “smart enforcement and smart policies.”<sup>19</sup> “Smart enforcement” was later adopted by Senator Ted Kennedy (D-MA), who linked it to comprehensive reform: “Strong and smart enforcement measures are a critical part of immigration reform, but we cannot regain control of our borders by simply cracking

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<sup>15</sup> As Janet Napolitano proudly reported in 2011:

In FY 2010, ICE removed 79,000 more aliens who had been convicted of a crime than it did in FY 2008. As a result, for the first time ever . . . over 50 percent of the aliens removed by ICE in a fiscal year were convicted criminals. Of those removed with no confirmed criminal conviction, more than two-thirds were either apprehended at the border or were repeat violators of our immigration laws.

Letter from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to Senator Dick Durbin (Aug. 18, 2011), available at <http://shusterman.com/pdf/napolitanoletter81811.pdf>.

<sup>16</sup> Rosenblum & McCabe, *supra* note 5, at 11.

<sup>17</sup> FY 2014 ICE Immigration Removals, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/removal-statistics/> (last visited Mar. 22, 2015).

<sup>18</sup> Renee Williams, *GOP Lawmaker Blasts Bush on Immigration*, UPI NEWS, June 29, 2005, [http://www.upi.com/Business\\_News/Security-Industry/2005/06/29/GOP-lawmaker-blasts-Bush-on-immigration/92071120076453/](http://www.upi.com/Business_News/Security-Industry/2005/06/29/GOP-lawmaker-blasts-Bush-on-immigration/92071120076453/).

<sup>19</sup> *Id.*

down harder.”<sup>20</sup> Senator Harry Reid (D-NV) adopted the phrase in 2006, with a similar linkage to a broader program: “We need tough and smart enforcement at the border and throughout our country. And we need realistic immigration laws that bring immigrants out of the shadows, paying taxes, learning English and contributing to our communities.”<sup>21</sup> Reid was responding to colleagues such as Representative Steve King (R-IA), who had said during the same Senate session: “Anybody that votes for an amnesty bill deserves to be branded with a scarlet letter, ‘A’ for amnesty, and they need to pay for it at the ballot box in November.”<sup>22</sup>

Compared to discourse of the type used by Representatives Tancredo and King, it is unsurprising that “smart enforcement” emerged as a successful administrative framework for reform. The trope has had considerable staying power, especially as immigration legislation has stalled. As then-DHS Secretary Janet Napolitano put it in March 2009: “At some point . . . our president and congress will re-engage on the underlying immigration law. Right now, my task is to make smart enforcement decisions on the law that we have.”<sup>23</sup>

The main political virtues of “smartness” as a guiding principle are that it is unassailable as a concept and ostensibly content-neutral. Its obvious vice, however, is that its apparent technocratic merits conflict with the inevitable value-based decisions demanded by the immigration enforcement system. It is, in the end, at best vacuous and at worst obfuscatory. Similar criticism has been leveled at the now-prevalent priorities used to structure discretionary enforcement decisions. A recent study, for example, has suggested that the controversial so-called “Morton memos” of 2010 and 2011 did *not* actually represent a particularly substantial policy shift. There were two reasons for this. First, they define DHS priorities “expansively.” Second, DHS, along with legacy INS, “has always focused on similar enforcement priorities.”<sup>24</sup> This critique may be a

<sup>20</sup> *Sen. Kennedy Speaks on Need for Comprehensive Immigration Reform*, US FED. NEWS, Oct. 25, 2005, available at 2005 WLNR 17362262.

<sup>21</sup> *Reid Floor Statement on Comprehensive Immigration Reform*, U.S. SENATE DEMOCRATS (Mar. 30, 2006), <http://democrats.senate.gov/2006/03/30/reid-floor-statement-on-comprehensive-immigration-reform/#.VRMYcfzF9h4>. As he continued, “I strongly support enforcement, but I also know that enforcement alone can’t solve the problem.” *Id.*

<sup>22</sup> Dana Milbank, *The Great Senate Immigr’A’tion Debate*, THE WASHINGTON POST, Mar. 31, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/30/AR2006033001798.html>.

<sup>23</sup> Cordula Meyer, *Interview with Homeland Security Secretary Janet Napolitano: ‘Away from Politics of Fear,’* SPIEGEL ONLINE (Mar. 16, 2009), <http://www.spiegel.de/international/world/interview-with-homeland-security-secretary-janet-napolitano-away-from-the-politics-of-fear-a-613330.html>.

<sup>24</sup> Rosenblum & McCabe, *supra* note 5, at 26. It is clear, however, that the Bush Administration had focused more on workplace enforcement and thus on “low priority” removals. In this sense, “smart enforcement” has been viewed as corrective.

bit overstated, however, as there have clearly been substantial shifts of focus in certain enforcement areas.

Recent history has demonstrated the difficulties of not only defining, but also managing smart enforcement. The complexity and fluidity of the system is daunting. The Department of Justice (“DOJ”), for example, was criticized in 2009 by a House report for its unclear budget requests relating to immigration enforcement:

*Immigration workload*—DOJ’s budget request fails to articulate, or account for, the increased resource requirements that result from other agencies’ activities. This is particularly true with respect to immigration, where the Department has been repeatedly forced to redirect internal resources in order to provide necessary judicial support and basic care for aliens turned over to DOJ by DHS. The practical effect of these redirections has been cuts to non-immigration programs at DOJ.<sup>25</sup>

Perhaps even more troubling, the vast sprawl of the immigration enforcement system seems to have eluded the attempts of even the sharpest objective minds to capture it. Indeed, a committee of the National Academy of Sciences “began its work fully intending to [specify and estimate] a quantitative statistical model of the federal immigration enforcement system.”<sup>26</sup> The committee ultimately concluded, however, “that building a quantitative model of the system’s behavior that would be useful for budgeting was impractical, both now and in the foreseeable future.”<sup>27</sup> This finding was a rather stunning revelation at the time and it does not seem to have gotten better in light of the recent complexity engendered by massive new administrative initiatives.

It is also obvious that enforcement costs vary tremendously with policy choices. Consider the costs of detention and hearings before immigration judges. In 2009, estimated costs were about \$6,400 per detainee. The Executive Office for Immigration Review’s (“EOIR”) estimate of “spending per matter handled” rose from slightly more than \$600 per

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<sup>25</sup> BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 7 (citing the report accompanying DOJ’s fiscal 2009 appropriations that mandated this study).

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Id.* (“[T]he committee concludes that its recommended approach will lead over time to improved budget estimates, but it cannot quantify the expected outcomes.”).

matter in 2003 to more than \$800 in 2010.<sup>28</sup> This figure, however, is subject to wide variations, as the cost of deporting a long-term lawful permanent resident (“LPR”) who may have counsel and who may raise various defenses to removal and request discretionary relief is clearly much higher. It is hard to calculate the exact number of such cases. However, according to EOIR statistics, some 70,000 to 80,000 LPR’s were placed in removal proceedings from 2003 to 2013.<sup>29</sup> Best estimates are that some 36,000 people were removed during that ten-year period.<sup>30</sup>

A dramatic shift has also occurred in the use of criminal prosecutions against border-crossers. The number of criminal prosecutions of immigration offenses has risen sharply in recent years, especially along the Southwest border.<sup>31</sup> As Allegra McLeod has noted, between 1990 and 2010, immigration offenses became the most common federally-prosecuted crimes in the United States.<sup>32</sup> Over the ten-year period from 2001 to 2010, criminal immigration case filings by U.S. Attorneys increased by 138% nationwide.<sup>33</sup> In 2010 alone, some 85,000 immigration-related criminal cases were processed in federal magistrate or district courts, up from about 25,000 in 2002.<sup>34</sup>

Though the apparent goal of such prosecutions has been to increase deterrence efficiently, their efficacy remains in doubt. Moreover, they have brought some worrisome distortions into the criminal justice system. The improper use of “aggravated identity theft” charges and mass processing during the raids in Postville, Iowa was an early harbinger.<sup>35</sup> Another example of such distortions was a major initiative, dubbed “Operation Streamline,” launched by the U.S. Attorney’s Office (“USAO”), federal district court judges, and U.S. Border Patrol supervisors in the Del Rio Border Patrol sector of the Western District of Texas in December 2005. It soon expanded to eight Border Patrol sectors in our federal court districts. Under this program, USAO filed criminal charges against as many

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<sup>28</sup> *Id.* at 20.

<sup>29</sup> These statistics can be found on Tab N1 of each of the Statistics Yearbooks from fiscal year 2003 to 2013. *Statistics Yearbooks*, EXEC. OFFICE OF IMMIGRATION REFORM, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/statspub/syb2000main.htm> (last updated Mar. 2015).

<sup>30</sup> E-mail from Marc Rosenblum, Deputy Dir., U.S. Immigration Policy Program, to author (Oct. 22, 2014 at 11:06 EST) (on file with author) (describing the underlying data).

<sup>31</sup> BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 77 (“Immigration . . . cases accounted for 30 percent of the new flow of criminal cases into U.S. attorneys’ offices nationwide in 2006 and 2007, 36 percent in 2008, 40 percent in 2009, and 44 percent in 2010.”).

<sup>32</sup> Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107 (2012).

<sup>33</sup> Budgeting for Immigration Enforcement, *supra* note 5, at 77.

<sup>34</sup> *Id.* at 57.

<sup>35</sup> See KANSTROOM, *supra* note 13, at 57–58.



noncitizens as possible who had allegedly crossed the Southwest border illegally. Groups of defendants then had their cases heard at the same time, as federal prosecutors sought routinized plea bargains under which the migrants—who were subject to felony reentry charges—were permitted to plead guilty to misdemeanor charges before magistrate judges (these are known colloquially as “flip flops”).<sup>36</sup> Such mass processing raises serious concerns about proper representation, due process, and many other important legal values.

### III. A RETURN TO FIRST PRINCIPLES

The assessment of how “smart enforcement” should work has changed rather dramatically over the past few years. As noted, the Obama Administration has long focused on interior removals of those convicted of crimes and on border removals (i.e., removals of undocumented noncitizens at or near the border).<sup>37</sup> Criminal removals (a diverse, highly problematic category discussed in more detail below) accounted for some 80% of interior removals during FY 2011 to FY 2013.<sup>38</sup> The number peaked at around 140,000 in FY 2011.<sup>39</sup> It should be noted that most of these “criminal aliens” were not convicted either of violent crimes or even of crimes that ICE had designated as the most serious. Many were long-term legal residents.<sup>40</sup> Though overall goals have not much changed, the “smart” approach has experienced many quick pivots. Consider, for example, the most recent dramatic revisions to the once highly-touted but also much-criticized Secure Communities Program.<sup>41</sup> As DHS Secretary, Jeh Johnson laconically put it in a memo dated November 20, 2014: “The

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<sup>36</sup> See BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 57.

<sup>37</sup> Border removals represented 70% of *all* removals in FY 2013. Rosenblum & McCabe, *supra* note 5, at 3.

<sup>38</sup> *Id.* Indeed, the largest single category from 2003 to 2013 was immigration crimes, demonstrating a dramatic increase in the use of the criminal justice system to enforce immigration laws.

<sup>39</sup> *Id.*

<sup>40</sup> See also Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013).

<sup>41</sup> The Secure Communities Program was established in 2008 and slated to expand to every state and local jail in the country by 2013. Its basic model was to check arrestees’ fingerprint data against national immigration databases as part of the booking process. ICE screeners would then forward information about potentially removable noncitizens to local ICE officials, who would then take custody of and deport arrestees following completion of their jail sentences. For a discussion of the early development of Secure Communities, see KANSTROOM, *supra* note 13, at 39–41; *Secure Communities and ICE Deportation, A Failed Program?*, TRAC IMMIGRATION (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/>.

Secure Communities program, as we know it, will be discontinued.”<sup>42</sup> Johnson plaintively noted that, “the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws.”<sup>43</sup> And yet this program was recently—and continues to be—heralded by many as the very *sine qua non* of “smart enforcement.”<sup>44</sup>

The most recent versions of “smart enforcement” embody a number of positive—albeit transient and discretionary—attributes.<sup>45</sup> It must also of course be assessed together with the Administration’s Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parental Accountability (“DAPA”) initiatives.<sup>46</sup> But the latest iterations continue to raise the most fundamental issue: Can we balance—in an enduring, structural way—public order, efficiency, legitimacy, and basic human rights? I suggest that the way forward is to go beyond such mantras as

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<sup>42</sup> Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Dep’t of Homeland Sec. Officers, Secure Communities (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> KANSTROOM, *supra* note 13, at 39–41; see also Julia Preston, *Republicans Resist Obama’s Move to Dismantle Apparatus of Deportation*, NY TIMES, Jan. 15, 2015, [http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html?\\_r=0](http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html?_r=0).

While I happen to agree with those who thought the former version was crudely inefficient and unfair for many reasons, Johnson inexplicably chose a new program name that is sure to inspire mockery, if not comparisons to Jimmy Carter’s “moral equivalent of war” (“MEOW”) response to the energy crisis: The new program is to be known as the “Priority Enforcement Program” (“PEP”). Perhaps a peppy enforcement model will have greater durability than a smart one did.

<sup>45</sup> It is described in a longer Memorandum, also sent by Jeh Johnson, on November 20, 2014 in which he lays out a much-refined version of enforcement priorities. Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Dep’t of Homeland Sec. Officers, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

Johnson expressly rescinds virtually all prior memoranda.

<sup>46</sup> The Deferred Action for Childhood Arrivals (“DACA”) program grants “deferred action” to individuals who came to the U.S. as children and who meet certain educational requirements. See Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to Dep’t of Homeland Sec. Officers, Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children (Jun. 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. The DACA program was expanded with the creation of a new program, “DAPA,” or Deferred Action for Parental Accountability, which grants “deferred action” status to parents of U.S. citizens and green card holders who have been residing in the United States for five years and who meet certain other requirements. See Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Dep’t of Homeland Sec. Officers, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

credibility and “smart enforcement” and to return to first principles. This approach requires consideration of three distinct questions:

1. What are the goals of interior immigration enforcement? More specifically, what is the end to which each distinct form of removal (or other enforcement method) is the means?
2. What basic human rights are implicated by various forms of immigration enforcement?
3. How—in light of our answers to the previous two questions—might we creatively reimagine immigration enforcement?

#### A. *The Goals of Enforcement*

As to the first question, there are two basic, primary goals for interior enforcement by removal and related mechanisms.<sup>47</sup> These are: *Extended border control and post entry social control*. By “primary goals” I mean to distinguish major *desiderata* from a host of possible secondary goals such as crime control, “national security,” ideological control, public health, foreign policy, respect for the “rule of law,” maintenance of federal supremacy over state laws, deterrence, *de facto* regulation of labor markets, etc. To be sure, the secondary goals of interior enforcement system differ for different government actors—legislative, executive/administrative, and judicial.<sup>48</sup> Much litigation has also erupted over state and local initiatives versus federal enforcement authority.<sup>49</sup> Such schisms are fundamental and not historically unique to this era.<sup>50</sup> The current system has grown slowly, incrementally, and reactively, having been crafted as much by accretion as by comprehensive revision. The system in action thus inevitably reflects an evolving, fluid conversation among the Congress, the executive branch, federal agencies, federal

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<sup>47</sup> For fuller explications of these distinctions, see Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); KANSTROOM, *AFTERMATH*, *supra* note 13.

<sup>48</sup> Indeed, as current debates show, even the goals of the Congress and the President seem to differ.

<sup>49</sup> See, e.g., *Arizona v. United States*, 567 U.S. \_\_\_, 132 S. Ct. 2492 (2012) (invalidating certain Arizona laws relating to immigration, while provisionally upholding a law that allowed Arizona state police to investigate the immigration status of an individual stopped, detained, or arrested if there is “reasonable suspicion” that the person is in the country illegally).

<sup>50</sup> See generally KANSTROOM, *DEPORTATION NATION*, *supra* note 47.

judges, and, perhaps, state legislatures, municipal officials, state and local enforcement agencies, and state court judges.

Obvious complexities also arise when we seek to understand the goals of specific practices. For example, the removal of a noncitizen who has violated terms of entry of which she was expressly informed may be justified on contractual grounds.<sup>51</sup> “She made a deal,” one might say, “and that is that.”<sup>52</sup> But justification is not the same thing as an end goal. No nation-state ever invented or enforced terms of admission in order to protect the ideal of contract law.<sup>53</sup> The contractual form of, for example, the visa-waiver entry model was designed to achieve the goal of orderly border control. Indeed, this is also true of all non-immigrant visa conditions of entry and stay. On a still deeper level, of course, the idea of maintaining the nation-state itself through border and residence control of noncitizens may also be understood as goals.<sup>54</sup> This is true—as constitutional lawyers might say—both “facially” (i.e., why does the nation-state system exist at all?) and “as-applied” (i.e., what ought to be the limits of sovereign power?). For purposes of this Article, however, I will tacitly accept the basic legitimacy of the nation-state. This acceptance implies the *basic* legitimacy of some forms of border control and therefore of *extended border control* removal. (It does not imply, of course, acceptance of arbitrary or disproportionately harsh implementation of such enforcement.)

Though some types of removal thus may seem to implicate multiple goals, the two forms work as polar heuristics. They also explain certain practices with precision. Expedited removal<sup>55</sup> at or near the border illustrates *extended border control*, pure and simple. Removal of long-term LPRs<sup>56</sup> for crime or other conduct (or associations) illustrates *post-entry*

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<sup>51</sup> See generally Hiroshi Motomura, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

<sup>52</sup> Cf. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (holding the government was permitted to retroactively change the terms of admission for Chinese noncitizens.)

<sup>53</sup> I am of course aware of the so-called Contract Labor Laws of the nineteenth century. However, the goal of these laws was protection of labor markets, not to vindicate contracts as such.

<sup>54</sup> See, e.g., Joseph Carens, *The Ethics of Immigration* (2013); Jacqueline Stevens, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (2009).

<sup>55</sup> See INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (stating that an “alien” who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission into the United States is inadmissible and may be removed from the United States without any further hearings or review, unless the “alien” indicates either an intention to apply for asylum or a fear of persecution).

<sup>56</sup> The concept of legal permanent residence was specifically crafted in 1921, though the notion of presumptive permanence long pre-dates that statute. See Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5 (1921).

*social control*.<sup>57</sup> These people have already been admitted, supposedly *permanently*. There is no expiration date for U.S. LPR status. One may remain in that status for life, and millions have done so over many years.<sup>58</sup> The control of the border and protection of nation-state sovereignty remain theoretically relevant in such cases, but only as deep background concerns. The fragility of the status of LPRs is designed to control *post-entry* behavior, not to vindicate control of the border in any proximate sense.

As we ponder the future of enforcement, we should seriously consider the basic legitimacy differences between these two basic types of removal. I do not suggest that either form is *inherently* illegitimate, but the differences matter when we ask what the future should look like and why. Thus, to reiterate: Once one accepts the basic legitimacy of the nation-state, then deportation of noncitizens as a tool of *extended border control* is both logically necessary and potentially legitimate so long as certain secondary questions are properly accounted for. For example, what sorts of rights claims ought to “trump” extended border control? Other relatively tractable questions have been answered by a *mélange* of U.S. constitutional interpretations, statutory schemes, administrative regulations, judicial and administrative case law, and—increasingly—exercises of executive prosecutorial discretion. Examples of such questions include: How long after entry is *extended border control* still legitimate? What sorts of factors might excuse unauthorized entry or presence? What sorts of family relationships should be taken into account? What procedures are required to protect fundamental rights and the legitimacy of the system? *Et cetera*.

As for *post-entry social control*, the threshold legitimacy arguments are much more complicated. Removal of otherwise legal residents due to post-entry conduct does not *primarily* vindicate border control. What, then, justifies it? Its tensions become especially apparent when we consider that the U.S. legal system has long accepted retroactive changes to such laws. Put simply, *a legal permanent resident may be removed for conduct which—when it was done—was not a basis for removal*.<sup>59</sup> The reasons for

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<sup>57</sup> An interesting challenge to this model may be the recent prioritization of removal of those who have been criminally convicted of immigration law violations. Essentially, it seems to me that the proper categorization of such removals depends upon the nature and timing of the offense.

<sup>58</sup> See *2013 Yearbook of Immigration Statistics*, U.S. DEP'T HOMELAND SEC., <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> (last updated June 16, 2014).

<sup>59</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, § 321, 110 Stat. 3009 (1996) (“Notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after [September 30, 1996].”); see also *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (analyzing the retroactive removal of relief provision: “statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective”); In re

this run deep in the history of immigration jurisprudence. Essentially, it is a by-product of the Supreme Court's determination in *Fong Yue Ting v. United States*,<sup>60</sup> that removal is a civil—as opposed to a criminal sanction. Though one can discern some recent erosion of the strong, formalistic version of this doctrine, it still stands.<sup>61</sup>

Leaving aside various rights claims and the presumptive illegitimacy of retroactive laws, let us consider *why* we deport otherwise legal residents for post-entry criminal conduct. The most common answers fall into two categories: First, one might say that “*we do this simply because we do this.*” This framing may seem ironic, but it is not facetious. The argument has two variants. The most basic is that we differentiate citizens (full members with rights to remain) from non-citizens and the main point of difference is that the latter, by definition, are always living in a kind of tenuous probationary status.<sup>62</sup> This argument has apparent virtues of clarity; but it is formalistic and circular.<sup>63</sup> Those who reason this way may (incorrectly) cite Hannah Arendt's notion of citizenship as “the right to have rights.”<sup>64</sup> But such strong versions of citizenship status raise many difficulties. Why, for example, should the results of what Ayelet Shachar has termed an arbitrary “birthright lottery” confer such powerful rights?<sup>65</sup> Is this not essentially a form of feudalism? Moreover, citizenship has never, in fact, been completely immune from revocation by governments under extreme circumstances. Thus, even the vaunted citizen's right to remain is more of a continuum of protection (or an *almost* irrebuttable presumption) than an absolutely impenetrable edifice. And does not the

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Lettman, 22 I. & N. Dec. 365, 366 (BIA 1998) (“[A]ny alien who has been convicted of a crime defined as an aggravated felony, and who was placed in deportation proceedings on or after March 1, 1991, is deportable regardless of when the conviction occurred.”); cf. *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) (holding INA § 101(a)(13) is not retroactive).

<sup>60</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>61</sup> See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *St. Cyr*, 533 U.S. 289; Daniel Kanstroom, *Deportation and the Right to Counsel: Padilla v. Kentucky and the Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011).

<sup>62</sup> See generally Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (1992).

<sup>63</sup> One way to explore its limitation is to ask how its proponents would respond to denationalization of citizens for, say, terrorist acts or affiliations. The most logical answer from this standpoint would be, essentially, “denationalization of citizens is wrong because citizenship inherently implies immunity from forced removal.”

<sup>64</sup> It is incorrect to assume that Arendt believed that citizenship *should* be the “right to have rights.” Rather, her view was descriptive of a particular historical period. See, e.g., Daniel Kanstroom, *Human Rights for All is Better than Citizenship Rights for Some*, EUROPEAN UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1268-the-return-of-banishment-do-the-new-denationalisation-policies-weaken-citizenship?showall=&start=9> (last visited Mar. 22, 2015).

<sup>65</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (2009).

strong, formalist version of citizenship tend to unduly relegate the rights claims of noncitizens? Put another way, is not the forced removal of a long-term legal resident for a minor offense the functional equivalent of banishment?

Another version of the “we do this because we do this” argument is contractual. By this I mean a justification of the following type: Noncitizens who apply for LPR (or other legal) status know or should know that they risk losing that status if they are convicted of crimes. Thus, “a deal is a deal.” But this argument does not withstand much scrutiny.<sup>66</sup> For one thing, many LPRs gain their status as infants or children. They are aware of no such conditions and cannot justly be expected to know of them intuitively. Second, to the best of my knowledge, there is no such explicit warning or guidance that is given to LPRs when they gain such status. Indeed, the USCIS Form I-797 that is sent to successful applicants for adjustment of status to lawful permanent residence has charming features that imply the opposite. It is entitled, for example “Welcome to the United States of America.” It repeats the word, “permanent,” at least *nine times*. There is also nothing that explains the risks to those who enter in legal nonimmigrant statuses, such as tourists, students, workers, etc. Third, even if there were such general warnings for adults (and one may reasonably assume some awareness by adults of the risks of criminal conduct), the welter of crimes and other conduct that may or may not result in removal renders the contract analogy very problematic.

The comparative weakness of these justifications illustrates the utility of the term, *post-entry social control*: We deport otherwise legal residents for post-entry criminal conduct for the same reasons that we punish citizen criminals. These include such classic goals of criminal justice as incapacitation, deterrence, and retribution.<sup>67</sup> These goals raise other legitimacy problems, however. First, research shows quite clearly that deportation works poorly as a crime control mechanism.<sup>68</sup> Second, even to the extent that deportation may make sense in certain scenarios for crime control, its use raises deep questions about its constitutional status. If crime control goals are taken seriously, then it is hard to accept either the venerable civil/criminal doctrine or the related idea that deportation is not punishment for constitutional law purposes. Much of the regime of *post-entry social control* deportation thus should be subject to at least some of

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<sup>66</sup> See MOTOMURA, *supra* note 51.

<sup>67</sup> See KANSTROOM, DEPORTATION NATION, *supra* note 47.

<sup>68</sup> KANSTROOM, *supra* note 13, at 88–89 (citing the work of Rubén Rumbaut).

the norms of the criminal justice system.<sup>69</sup> Those who face its sanctions should have, as a minimum, the rights to bail and to appointed counsel. They should also be protected against *ex post facto* laws, double jeopardy, and double punishment.

Even a more limited regime of *post-entry social control* deportation for, let us say, suspected foreign terrorists, severe human rights abusers, and certain other serious criminals, leaves many substantial questions. We must again ask the questions I posed above for *extended border control*, i.e.: How long after entry is removal still legitimate? What evidence is required? What sorts of factors might excuse post-entry conduct? What sorts of family relationships should be taken into account? What procedures are required to protect fundamental rights and the legitimacy of the system? Is this double punishment?

There is also a serious—if delicate—question of societal responsibility. As a 1953 Presidential Commission noted (during an era when *post-entry social control* deportations were relatively rare):

Each of these aliens is a product of our society. Their formative years were spent in the United States, which is the only home they have ever known. The countries of their origin, which they left—in two cases during infancy, in another, at the age of 5 years—certainly are not responsible for their criminal ways . . . . If such a person offends against our laws, he should be punished in the same manner as other citizens and residents of the United States and should not be subject to banishment from this country.<sup>70</sup>

Thus, when we focus on legitimate enforcement goals, those of *extended border control* removal are more simply and directly tied to immigration control than are those of *post-entry social control* removal. Therefore, it seems logical that more attention ought to be paid—and resources devoted to—enhancing the *extended border control* system. If we were to dramatically de-emphasize *post-entry social control* removal this would not ignore its main goals. It would simply return them to the enforcement system that is best equipped to handle them: the criminal justice system. I am, of course, aware of the political difficulty of

<sup>69</sup> See KANSTROOM, DEPORTATION NATION, *supra* note 47; Kanstroom, *supra* note 61.

<sup>70</sup> PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 202 (1953).



implementing such a suggestion. Little is more politically popular than cracking down on “criminal aliens.” One can surely appreciate why the latest Jeh Johnson Memo on “Apprehension, Detention and Removal” continues to prioritize *post-entry social control* removal. Indeed, most of the top sub-categories of enforcement deemed “Priority 1” and “Priority 2” relate to undefined goals of “public safety,” “national security,” and crime control.<sup>71</sup> But let us at least view the legitimacy differential as worthy of consideration as we move to a consideration of basic rights.

### B. Basic Rights

One surely does not have to believe in open borders to recognize that rights claims limit enforcement options.<sup>72</sup> For example, neither U.S. nor international law generally permits the exclusion or the removal of those who qualify as refugees or of those who would face torture in the country to which they would be returned.<sup>73</sup> (Of course, there are exceptions and both of these substantive categories are enormously complex and fluid.) Put briefly, basic substantive rights that must be considered are: protection

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<sup>71</sup> Cf. Memorandum from John Morton, Assistant Sec’y, Dep’t of Homeland Sec. to All Immigration & Customs Enforcement Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), *available at* [http://www.ice.gov/doclib/detention-reform/pdf/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf) (establishing those who pose “a danger to national security or a risk to public safety” as “priority one,” recent illegal entrants as “priority two,” and immigration fugitives or those who “otherwise obstruct immigration controls” as “priority three”); Memorandum from John Morton, Assistant Sec’y, Dep’t of Homeland Sec. to All Immigration & Customs Enforcement Field Office Directors, Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Assistant Sec’y, Dep’t of Homeland Sec. to All Immigration & Customs Enforcement Field Office Directors, Special Agents in Charge, and Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>; Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv. to All Immigration & Naturalization Serv. Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000), *available at* <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00>; Memorandum from Julie L. Myers, Assistant Sec’y, Dep’t of Homeland Sec. to All Immigration & Customs Enforcement Field Office Directors and Special Agents in Charge, Prosecutorial and Custody Discretion (Nov. 7, 2007), *available at* <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myers-Memo-Custody-Discretion-11-7-07.pdf/view>.

<sup>72</sup> See generally Daniel Kanstroom & Jessica Chicco, *The Forgotten Deported: A Declaration on the Rights of Expelled and Deported Persons*, N.Y.U. J. INT’L L. & POL. (forthcoming 2015) [hereinafter Kanstroom & Chicco, *The Forgotten Deported*]; Daniel Kanstroom & Jessica Chicco, *Draft Declaration on the Rights of the Forcibly Expelled*, POST-DEPORTATION HUMAN RIGHTS PROJECT, <http://www.bc.edu/content/dam/files/centers/humanrights/pdf/DRAFT%20Declaration%20on%20the%20Rights%20of%20Expelled%20and%20Deported%20Persons.pdf> (last visited Mar. 22, 2015).

<sup>73</sup> See sources cited *supra* note 72.

from harm (including not only refugee protections and Convention Against Torture (CAT) claims, but also protections during detention, transit, and removal), protection of human dignity, family unity, “affiliation” rights,<sup>74</sup> privacy rights, special protections for vulnerable persons (e.g., children), anti-discrimination/equal protection (including prohibitions on group expulsions), property rights, and proportionality. More contested (or perhaps “evolving”) substantive rights claims include broader definitions of family, rights to work, protections of accrued government benefits, possible protection of a right to stay in “one’s own country,”<sup>75</sup> and such post-removal issues as a right to visit family (with appropriate constraints), rights to collateral motions, rights to appeal, etc. Well-recognized basic procedural rights include: fair hearing/due process rights (e.g., notice, opportunity to be heard by competent authority, representation [though not necessarily appointed counsel], right to an interpreter, anti-arbitrariness) and various—though often depreciated versions of—constitutional protections such as a Fourth Amendment exclusionary rule,<sup>76</sup> and Fifth Amendment protections against the use of coerced evidence.<sup>77</sup> Though space limitation precludes a full listing of sources here, such rights claims take into account both U.S. constitutional adjudication and, increasingly, international human rights norms.<sup>78</sup> This Article will focus most on two particular aspects of rights claims: proportionality and what Hiroshi Motomura has aptly termed, “immigration as affiliation.”<sup>79</sup>

### C. Proportionality and Affiliation

A rich scholarly literature has developed in recent years about the concept of proportionality, both in immigration enforcement and more generally.<sup>80</sup> In the immigration concept, proportionality has most typically

<sup>74</sup> See generally MOTOMURA, *supra* note 51.

<sup>75</sup> See, e.g., Devon Whittle, *Nystrom v. Australia*, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011), 19 AUSTL. INT’L L. J. 235 (2012), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2270894](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2270894).

<sup>76</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (limiting exclusionary rule in deportation proceedings).

<sup>77</sup> *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977) (upholding Fifth Amendment protections in deportation proceedings).

<sup>78</sup> See KANSTROOM, *supra* note 13, chs. 6–7. See generally Kanstroom & Chicco, *The Forgotten Deported*, *supra* note 72.

<sup>79</sup> MOTOMURA, *supra* note 51, at 81–90.

<sup>80</sup> See, e.g., AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans.) (2012); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1671–79 (2009) (arguing that due process requires proportionality and proposing statutory relief from removal to permit immigration judges to ensure proportionality); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684–85 (2009); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 415–16 (2012).

been seen as a constraint on enforcement, often in the guise of a discretionary balancing test. Juliet Stumpf has contrasted criminal law which, she notes, is “animated by the idea that the punishment must be proportionate to the crime,” with immigration law, which has increasingly adopted more of a one size fits all model, where deportation is “the ubiquitous penalty for any immigration violation.”<sup>81</sup> Mike Wishnie usefully defines proportionality as, simply, “the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense.”<sup>82</sup>

Though U.S. courts have remained relatively oblivious to proportionality constraints in immigration law, international law has long respected the concept. Various international instruments recognize the importance of family unity and the rights of parents and children to reside together.<sup>83</sup> The European Court of Human Rights has made clear that deportation must be “proportionate to the legitimate aim pursued.”<sup>84</sup> At the most basic level, this means that judges must balance the individual’s circumstances against the nation-state’s interest in removal. The Inter-American Commission on Human Rights has similarly intoned, “It is well-recognized under international law that a Member State must provide non-citizen residents an opportunity to present a defense against deportation based on humanitarian and other considerations.”<sup>85</sup>

Proportionality is a constraint on power that mandates consideration of certain extraneous factors in order to justify removal. Some of these factors may be encapsulated by the concept of affiliation. As Hiroshi Motomura notes, the Supreme Court has highlighted the ties that many lawful

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<sup>81</sup> Stumpf, *supra* note 80, at 1683–84, 1687, 1732 (proposing a system that should consider: “(1) the gravity of the violation, taking into account the nature of the violation and any consequences, (2) the benefit to the United States of imposing the proposed sanction and, conversely, any harm to the United States, the noncitizen, or others resulting from its imposition, and (3) the stake that the noncitizen has in remaining in this country”); *see also*, Juliet Stumpf, *Penalizing Immigrants*, 18 FED. SENT’G REP. 264, 264 (2006).

<sup>82</sup> Wishnie, *supra* note 80, at 416.

<sup>83</sup> *See, e.g.*, Universal Declaration of Human Rights art. 16, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”); International Covenant on Civil and Political Rights (ICCPR) art. 17, G.A. Res. 2200 (XXI) A, 21 U.N. GAOR Supp. No. 16, U.N. Doc A/6316 (Dec. 16, 1966) (prohibiting “arbitrary or unlawful interference with . . . family [or] home”); Convention on the Rights of the Child art. 7, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (Nov. 20, 1989) (guaranteeing “as far as possible, the right to know and be cared for by his or her parents”).

<sup>84</sup> *See, e.g.*, *Dalia v. France*, 1998-I Eur. Ct. H.R. 14–15.

<sup>85</sup> Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L./V/II.139, doc. 21 ¶ 5 (2010); *see also id.* at ¶ 56 (“[T]he IACHR particularly emphasizes that the best interest of minor child must be taken into consideration in a parent’s removal proceeding.”).

immigrants had to the United States: “Aliens like citizens pay taxes and may be called into the armed forces . . . may live within a state for many years, work in the state and contribute to the economic growth of the state.”<sup>86</sup> This analysis has long justified a strict scrutiny of state discrimination based on alienage.<sup>87</sup> Is it not also a powerful constraint on removal? As a matter of constitutional doctrine, the answer, as noted, has been no. However, statutory immigration law protections, such as “Registry”<sup>88</sup> have taken affiliation into account by protecting long-term residents from removal under certain circumstances. Similarly, various discretionary mechanisms have recognized “positive equities” of affiliation and have also elevated certain family ties to central roles in adjudicating waivers and “relief” from removal.<sup>89</sup> Indeed, the President’s recent DAPA initiative expressly takes certain family ties into account as threshold bases for the positive exercise of prosecutorial discretion.<sup>90</sup> Immigration enforcement, in short, has never been completely oblivious to either substantive or procedural rights claims. Let us move, then, from the consideration of *what* rights are at issue to more specific suggestions about *how* we might best balance the goals of interior enforcement, efficacy, and basic rights.

#### IV. CREATIVE RE-IMAGINATION: STRUCTURAL PROPORTIONALITY AND GRADUATED SANCTIONS

When we consider the metrics by which we should measure the quality of enforcement, we find a wide range of options, commonly deployed but rarely examined fundamentally. The basic options include: utilitarian efficacy (i.e., what works?); political pragmatism (i.e., what is popular?); managerial or bureaucratic optimization (i.e., what is best organized?); financial costs; strong deference to rights claims including Kantian (or religious) moral concern for human dignity; and the best models of the

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<sup>86</sup> *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (citing *Leger v. Sailer*, 321 F. Supp. 250 (E.D. Pa. 1970)).

<sup>87</sup> *Id.*

<sup>88</sup> INA § 249, 8 U.S.C. § 1259 (2012).

<sup>89</sup> *See, e.g.*, Cancellation of Removal, INA § 240A, 8 U.S.C. § 1229b (2012).

<sup>90</sup> DAPA, or Deferred Action for Parental Accountability, grants “deferred action” status to parents of U.S. citizens and green card holders who have been residing in the U.S. for five years and meet certain other requirements. *See* Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Dep’t of Homeland Sec. Officers, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

“rule of law” in all of its complexity (including discretion as a quasi-legal concept). It is obvious that no single such criterion should or could dominate all questions. Still, it is not only possible, but inevitable (and perhaps wise), to emphasize certain criteria above others in support of creative policy choices.

Efficacy is often touted as the best primary metric. However, as noted, it is apparent that neither *extended border control* nor *post entry social control* has been especially effective. Much of the reason for the ineffectiveness has been the inherent impossibility of the mission. Interior border enforcement has been deemed rather ineffective by most experts, as most obviously confirmed by an undocumented population of some eleven or twelve million people. Although flows subsided sharply during the economic downturn, most researchers ascribe this much more to economic factors than to enforcement.<sup>91</sup> Indeed, one study found that some nine out of ten of those who were apprehended on their first attempt and who were then eventually released back to Mexico succeeded in entering undetected on a second or third attempt. More than half of all unauthorized entrants were not apprehended at all.<sup>92</sup> Various mechanisms have then been put in place to try to address this phenomenon, most of which—such as criminal prosecution of border-crossers—are quite expensive and, as noted, not unproblematic. Indeed, border enforcement and *extended border control* removals may have the exact opposite effect intended by their supporters. One 1997 study that measured the probability of apprehension at the border, found that it *increased* the likelihood of undocumented migration.<sup>93</sup> Similarly, a 2010 study found that deportations of undocumented noncitizens from the United States also tended to increase undocumented migration.<sup>94</sup> The reasons for this apparently counter-intuitive fact require one to dig deeper into how such enforcement actually relates to migration. Increased enforcement increases the duration of trips and reduces the

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<sup>91</sup> See BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 34 (“As U.S. economic conditions have deteriorated in the past 5 years, enforcement activities have increased; but rising enforcement does not seem to have played a significant role in lowering the likelihood of undocumented migration.”).

<sup>92</sup> See *id.* at 32; see also CENTER FOR COMPARATIVE IMMIGRATION STUDIES, MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE (Wayne A. Cornelius et al. eds., 2010); Wayne A. Cornelius, *Evaluating Recent U.S. Immigration Control Policy: What Mexican Migrants Can Tell Us*, in CROSSING AND CONTROLLING BORDERS: IMMIGRATION POLICIES AND THEIR IMPACT ON MIGRANTS’ JOURNEYS 191–203 (Mechthild Baumann et al. eds., 2011).

<sup>93</sup> Douglas S. Massey & Kristen E. Espinosa, *What’s Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. OF SOC. 939–99 (1997).

<sup>94</sup> Douglas S. Massey & Fernando Rios, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 137–61 (2010).

likelihood of return migration, which had been a long historical pattern prior to the current era.<sup>95</sup> As the United States has never been able to completely seal all of the southern border, let alone water routes, border enforcement has tended to shift border crossing away from some areas but towards other pathways.<sup>96</sup> It also increases the likelihood of crossing with a border smuggler, thus not only rendering the system more dangerous for migrants, but also rendering border crossing a more professional enterprise.<sup>97</sup> The percentage of migrants using paid guides (“coyotes”) has steadily risen, from around 80% in the early 1990s—before the recent expansion of enforcement began—to nearly 100% by 2010.<sup>98</sup> Researchers have also concluded that demographic changes in Mexico may well account for vastly reduced migration north in coming years.<sup>99</sup> The average annual increases in the number of ten- to fourteen-year-old males in the population shrank from about 150,000 per year in the 1970s and 1980s to approximately 20,000 per year by 2010. On the other hand, it is far from clear that the Mexican economy is improving in a way that would meet even this reduced labor demand.<sup>100</sup>

The data regarding *post entry social control* removals are similarly demoralizing. Though U.S. crime rates have subsided in recent years, the best evidence indicates that deportation has had little, if anything to do with this. It is—at best—a costly, overbroad, and inefficient mechanism of crime control.<sup>101</sup> Of course, some serious offenders and tens of thousands of low level offenders have been removed from the United States. Undoubtedly, this has reduced some crime within U.S. borders though it seems to have spawned crime elsewhere, some of which has made its way back to the United States.<sup>102</sup> One must also consider the costs of such removals (in terms of law enforcement resources, the wisdom of focusing on noncitizens as compared to citizens, incarceration costs, etc.) as well as the substantial collateral consequences of these removals.<sup>103</sup>

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<sup>95</sup> BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 34–35.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 35.

<sup>98</sup> *Selected Results: Graph 2, MEXICAN MIGRATION PROJECT* (July 2013), <http://mmp.opr.princeton.edu/results/002coyote-en.aspx>.

<sup>99</sup> BINATIONAL STUDY ON MIGRATION, MIGRATION BETWEEN MEXICO & THE UNITED STATES (1997); Gordon H. Hanson & Craig McIntosh, *The Great Mexican Emigration*, 92 REV. OF ECON. & STAT. 798, 798–810 (2010).

<sup>100</sup> BUDGETING FOR IMMIGRATION ENFORCEMENT, *supra* note 5, at 35.

<sup>101</sup> See KANTROOM, *supra* note 13, at 88–89.

<sup>102</sup> *Id.* at 135–63.

<sup>103</sup> *Id.*

So if not efficacy, then what? Here is a way to envision how we might better structure consideration of ends, means, and rights. A simple grid shows how the two major types of interior enforcement are typically exercised against types of noncitizens. Bear in mind that the *extended border control system* now strongly tends towards the informal, with fewer procedural protections.<sup>104</sup>

Status	Extended Border Control	Post-Entry Social Control
<i>Undocumented</i>	Primary	Secondary
<i>Short-term non-immigrants</i>	Primary	Secondary
<i>Long-term non-immigrants</i>	Primary	Secondary
<i>Permanent Residents</i>	Secondary (if at all)	Primary

The *post entry social control* system is more likely to need to be deployed against long-term legal residents, many of whom have strong affiliation and proportionality claims. Though it is also sometimes used against the undocumented (especially in the recent up-tick of criminal prosecutions for re-entry), the *post entry social control* system is rarely necessary near the border for short-term residents.

To develop a better system we might also consider a more refined presumptive<sup>105</sup> “legitimacy” grid that includes such factors as length of residence, claims of hardship, and family ties.<sup>106</sup>

<sup>104</sup> *American Exile, Rapid Deportations that Bypass the Courtroom*, AM. CIVIL LIBERTIES UNION (Dec. 2014), <https://www.aclu.org/american-exile-rapid-deportations-bypass-courtroom>; JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS (2011), available at [http://web.stanford.edu/group/irc/Deportation\\_Without\\_Due\\_Process\\_2011.pdf](http://web.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf).

<sup>105</sup> I call this presumptive because, as noted above, there are many factors that can render enforcement at or near the order highly illegitimate and unjust.

<sup>106</sup> Retroactivity and the possibility of alternative enforcement measures such as criminal prosecution also lower the legitimacy of immigration enforcement.

	Time	Family/ Affiliation	Fear of Harm	Conduct	Other Mechanisms
<i>Higher Legitimacy</i>	Recent entrants	No ties	Minimal	Non-Violent	None
<i>Lower Legitimacy</i>	Long term residents	Strong ties	Substantial	Serious Crime	Some

Such grids are undoubtedly crude. They may also seem cumbersome and judicially oriented. They seem inevitably to require inefficient, time-consuming discretionary balancing. However, as noted, the legal history of deportation indicates a recurrent recognition of the propriety of these factors. Indeed, one of the most important themes of modern deportation history—the rise of discretionary forms of relief from deportation—is perhaps best understood in this way. Rather than re-introducing such considerations in the unpredictable guises of prosecutorial discretion or even discretionary relief administered by immigration judges, could we make them central to the enforcement system itself? Implementing these considerations would lead to a few possible approaches.

Most fundamentally, one might first ask why we deport long-term legal residents who commit crimes, instead of simply punishing them in the criminal justice system as we do citizens. It is hardly unthinkable to simply eliminate this form of removal from our system. Many in Europe have argued in favor of such policy reform with some success.<sup>107</sup> The arguments in favor of such elimination are substantial. First, we would instantiate, in a *structural* way, the basic principles of justice and fairness that undergird legitimacy. Second, we would save hundreds of millions of dollars, even by the most conservative estimates. This includes the costs of investigating such people, placing them into removal proceedings, adjudicating such proceedings, dealing with post-removal issues, and dealing with the immeasurable costs to families and communities and receiving countries.<sup>108</sup> Third, we would save enormous time and energy in our immigration courts and among our criminal justice system, which must process such possible deportees, detain them, etc. Fourth, we would rectify, at least in part, various doctrinal distortions in our legal system,

<sup>107</sup> See Kanstroom & Chicco, *supra* note 72.  
<sup>108</sup> See generally KANSTROOM, *supra* note 13.



such as the rigid civil/criminal divide of *Fong Yue Ting v. United States*, the indefensible idea that such removal is not constitutional punishment, etc.

To be sure, there are also strong arguments to be made against such a proposal. On the most fundamental level, one might argue that this proposal undercuts the citizen/alien divide itself and depreciates the value of U.S. citizenship. It is also likely to be spectacularly unpopular politically, as the case to be made for “criminal aliens” is, to say the least, nuanced, and the constituency in support of it is small. Further, this political unpopularity could ultimately result in backlash and harsher, more vague, more discretionary enforcement modalities. Some might also argue that the removal of criminals is a legitimate, flexible enforcement tool that dovetails passably well—even if imperfectly—with the more rigid structures of the criminal justice system. It gives the government particularly useful flexibility to deal with crime, as well as a host of foreign policy and national security concerns. Finally, it is generally well accepted—at least as a concept—historically and among virtually all nation-states. I will leave it to thoughtful readers to weigh these various arguments for and against my strongest proposal. First, however, let me also offer two other related suggestions for reform of immigration enforcement.

#### A. *Proportionality, Affiliation, and Time*

The first suggestion is to take proportionality and affiliation rights seriously in a structural way. This suggestion is neither radical nor even especially unique as a matter of legal theory. As we have seen, the current system tends to relegate proportionality and affiliation to limited *ad hoc* mechanisms, often costly, time-consuming, and highly dependent on such variables as whether a person has legal counsel, which immigration judge hears the case, what modes of procedure are chosen by ICE, etc. One could certainly improve on this discretionary adjudications model, as I and others have long suggested.<sup>109</sup> One could look to the European or Inter-American system for guidance.

How might we approach these questions less as discretionary balancing and more as structure? The simplest model, short of abolition, is a statute of limitation. A recent study found that the median time span between entry and apprehension for certain types of *extended border control* removals was four days. Compare this to the median time for immigration

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<sup>109</sup> See, e.g., KANSTROOM, *supra* note 13, 210–27.

apprehension following a criminal conviction: 380 days.<sup>110</sup> Indeed, some 54,000 removals from FY 2003 to 2013 were due to a criminal conviction that had taken place more than five years earlier.<sup>111</sup> As noted, many of those removed for crime have been LPRs for many years. Moreover, immigration judges granted some 50% of applications for discretionary relief by LPRs during the ten-year period from 2003 to 2013. Let us assume that there were good reasons for so high a grant rate. Note, too, that the immigration court system is completely overwhelmed. Structural mechanisms could thus be more efficient, cheaper, and fairer. The statute of limitation could be based either upon the length of time between conduct and the commencement of removal proceedings or upon the length of time between initial entry in the United States and removal. Neither is a new idea. Early deportation statutes that aimed at prostitutes, for example, contained one and three year time limitations after entry.<sup>112</sup> The 1953 Presidential Immigration Commission recommended—during the height of the Cold War—a general ten-year statute of limitations for any lawful immigrant.<sup>113</sup> As the Commission noted, “That it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system.”<sup>114</sup>

The current system contains a few limits of this type. Some *post-entry social control* grounds are already time-limited, particularly the “moral turpitude” basis for removal. Registry<sup>115</sup> is another obvious example, but it is analogous to lagging minimum wage laws in that it currently requires entry before 1972 and has not been updated. Also, it contains numerous discretionary criteria, such as “good moral character,” that render it something of a hybrid model. But, let us recall the similarities discussed above between *post entry social control* removals and criminal prosecutions. The statute of limitations for most federal crimes is five years. Why does this not make sense for removal? It seems particularly apt for *post entry social control* removals of those who are otherwise in legal

<sup>110</sup> Rosenblum & McCabe, *supra* note 5, at 4.

<sup>111</sup> *Id.* at 17 (noting that incarceration may account of many time lags, and that most of these removals were for FBI Part 1 or FBI Part 2 (violent) offenses). However, shows some 25,000 removals were due to nonviolent offenses, drugs, traffic (other than DUI) and “nuisance” crimes. *Id.* at tbl.4.

<sup>112</sup> KANSTROOM, DEPORTATION NATION, *supra* note 47, at 125–130.

<sup>113</sup> PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, *supra* note 70, at 198.

<sup>114</sup> *Id.* at 197, 202 (discussing one crime of moral turpitude and other criminal grounds).

<sup>115</sup> See INA § 249, 8 U.S.C. § 1259 (2012) (offering a lawful admission for noncitizens who arrived in the United States before 1972, are of good moral character, and are not inadmissible based on various enumerated grounds, including ties to terrorism or conviction of a crime of moral turpitude). See Wishnie, *supra* note 80, at 440.

status, as the objection could not be made in that scenario that it facilitates a continuing offense or constitutes a back door to legal status.

Mike Wishnie has highlighted another arena in which proportionality and recognition of affiliation should play a bigger role. Current deportation laws ban lawful return for at least five years and in some cases, forever. The law requires five years if the removal order is entered upon one's arrival or attempted entry into the United States, ten years if the removal proceeding is commenced after initial entry, twenty years for a second or subsequent order, and a lifetime ban if the person was convicted of an "aggravated felony."<sup>116</sup> Although one can understand the deterrence goals of such laws, they are surely disproportionate for minor aggravated felonies, of which there remain many. They may also be disproportionate for re-entry cases that do not consider the compelling reasons that often motivate people to re-enter without authorization.

### *B. Graduated Sanctions*

The bars on re-entry have at least one virtue that is lacking in much of the rest of the removal regime: they embody a regime, albeit a harsh one, of "graduated sanctions." This enforcement model is commonplace in other areas of enforcement, particularly involving juveniles and drug offenses. In juvenile law, for example, the term has been statutorily defined as:

[A]n accountability-based, graduated series of sanctions (including incentives, treatment, and services) . . . to hold such juveniles accountable for their actions and to protect communities from the effects of juvenile delinquency by providing appropriate sanctions for every act for which a juvenile is adjudicated delinquent, by inducing their law-abiding behavior, and by preventing their subsequent involvement with the juvenile justice system.<sup>117</sup>

More generally, the concept is "a conceptual framework for a continuum of disposition options that juvenile court personnel, particularly judges, probation officers and other similar court officials can use for

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<sup>116</sup> 8 U.S.C. § 1182(a)(9)(A)(i)-(iii) (2012). These bar on lawful return may be waived by the Attorney General. The statutory category "aggravated felony" is extremely expansive and includes a wide range of misdemeanors and nonviolent offenses. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-41 (2000).

<sup>117</sup> 42 U.S.C. § 5603(24) (2012).

delinquency reduction.”<sup>118</sup> Such systems use a “multi-tiered continuum” of intervention of services and programs that allows the system to match specific characteristics of the offender, typically with an objective assessment or structured decision making instrument.<sup>119</sup>

Two things should be immediately apparent about graduated sanctions: First, they seek to implement goals not only of retribution and deterrence, but also rehabilitation, with due recognition for proportionality. Second, they tend to be *post-hoc* guidelines for judges who exercise discretion.<sup>120</sup> What may not be as apparent is the fact that the goal of efficiency also animates graduated sanctions. As one report noted, “[u]sing risk and needs assessment in conjunction with graduated sanctions combines public safety with cost efficiency.”<sup>121</sup> A thoughtful regime of graduated sanctions “increases the likelihood that serious offenders will be incarcerated while those who present a lesser danger are placed in less expensive, community-based programs.”<sup>122</sup>

This model could easily be applied in removal proceedings, particularly against first-time youthful offenders, the vast majority of whom tend to be relatively young men. Instead of the current “one size fits all” and “one strike and you are out” models, why not build in the authority for immigration judges to partner with existing social service and probation networks to craft creative alternatives to removal and lifetime banishment? Such a model would constitute an intermediary mechanism between—on the one hand—binary removal systems, and—on the other—relatively contentless *ad hoc* relief from removal discretion by judges. It would be cost-effective, humane, and responsive to the legitimate goals of *post entry*

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<sup>118</sup> Other names for accountability-based sanctions systems include: graduated options, graduated alternatives, graduated responses, graduated incentives and graduated consequences. David G. Gamble, *Graduated Sanctions*, NASJE NEWS QUARTERLY, <http://nasje.org/news/newsletter0702/resources02.htm> (last visited Mar. 22, 2015).

<sup>119</sup> *Id.*; see also JUVENILE SANCTIONS CTR., NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, GRADUATED SANCTIONS FOR JUVENILE OFFENDERS: A PROGRAM MODEL AND PLANNING GUIDE: DISPOSITIONAL COURT HEARING TO CASE CLOSURE, VOL. II (2005), available at [http://www.ncjfcj.org/sites/default/files/vol.2planningguidejcscl8\\_0.pdf](http://www.ncjfcj.org/sites/default/files/vol.2planningguidejcscl8_0.pdf); MARK MATESE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAM, ACCOUNTABILITY-BASED SANCTIONS (1997), available at <https://www.ncjrs.gov/pdffiles/fs-9758.pdf>.

<sup>120</sup> See, e.g., *Juvenile Justice Reform Initiatives in the States 1994-1996: The Movement Towards Graduated Sanctions*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAM, [http://www.ojjdp.gov/pubs/reform/ch2\\_f.html](http://www.ojjdp.gov/pubs/reform/ch2_f.html) (last visited Mar. 22, 2015) (“Inherent in graduated sanctions programs is the notion of providing swift and appropriate punishment to youth offenders based on the gravity of their offense and an assessment of the potential risk for reoffending, coupled with appropriate treatment to reduce the risk of recidivism.”).

<sup>121</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, A LEGISLATOR’S GUIDE TO COMPREHENSIVE JUVENILE JUSTICE (1996), available at <https://www.ncjrs.gov/pdffiles1/Digitization/165150NCJRS.pdf>.

<sup>122</sup> *Id.*

*social control* removal, such as they are. Moreover, it would recognize the convergence between the criminal law and deportation laws of this type.<sup>123</sup>

Of course, one can also imagine objections to this proposal. It could be, one might say, inevitably cumbersome, expensive, too discretionary, and lacking in institutional and political support. It is also, as noted, generally more akin to a sentencing regime, rather than a re-structuring of the front-end standards of the removal system. But, before we reject a new model too quickly, let us recall the dysfunctionality of the current system and its dreadful human costs. Why not a pilot project, akin to what is now being tried in New York and other venues with a right to counsel? Such a “graduated sanctions” experiment would be rather easy to implement in a local immigration court, and its effectiveness would be equally easy to measure, in terms of recidivism, likelihood of attendance at hearings, and effects on families.

#### V. CONCLUSION: TOWARDS CREATIVE RE-IMAGINATION OF INTERIOR IMMIGRATION ENFORCEMENT

[S]o long as the law permits aliens to remain in this country without time limit, . . . a moral, if not a legal, obligation exists to treat such people fairly. Especially where . . . the alien is permitted to become a full-fledged member of the community in which he lives; to be employed, to own property, to marry and raise a family, to pay taxes, to serve in the armed forces, and otherwise to participate in all activities save those reserved for citizens, such as voting. It is clear, therefore, that to aliens who have lived in the United States for many years, who have become integrated into its community life, and whose ties to their mother country may have become remote and purely technical, a deportation order becomes the most severe and cruel penalty imaginable.<sup>124</sup>

In conclusion, we should squarely face a few dominant realities that must govern our analysis going forward. First, the economic and social forces that have compelled millions of poor people to migrate to the United States show little signs of abating in the foreseeable future. Complete

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<sup>123</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>124</sup> PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, *supra* note 70, at 193–94.

control of the border is a fantasy. Ultimate solutions require paying real attention to the forces that drive migrants north in the first place. Failing that, border control is far better than *either* massive interior enforcement or sub-contracting enforcement to Mexican or Guatemalan police.

Second, all available studies show that *post-entry social control* removal of “criminal aliens” is not an optimal crime control strategy in terms of the targeted population, the expense, the effects on community-police relations, etc. It has had enormous negative consequences, predominantly on young men of color and their families.

Third, the Obama Administration’s focus on the *post entry social control* rationale (i.e., “smart enforcement”), while understandable politically and in some cases legitimate (e.g., for very serious crimes committed by relatively recent entrants with few or no family ties), is much more problematic than is generally thought. It raises both practical problems (as illustrated by Secure Communities) and profound normative questions.

As part of a broad legalization program that rectifies the accumulated problems of the past two decades or so, we should seriously re-think interior enforcement, and should consider:

1. The elimination or at least the dramatic de-emphasis of *post-entry social control* removals. At the very least, a substantial revision of the aggravated felony category is needed.
2. The serious consideration of statutes of limitation analogous to those in the criminal justice system, and meaningful implementation of proportionality and affiliation constraints on removal that are analogous to the protections of international human rights law. The protections should not only be seen as discretionary factors, but should be implemented *within the basic statutory criteria that govern removal*. They could thus supplant much controversial prosecutorial discretion.
3. We should devote more thought to an experiment with *graduated sanctions* in removal cases. This necessitates more creative thinking about *both* the structural components and mechanisms of deportation law. We should seriously consider forms of probation. We certainly should move beyond the current rather harsh and binary model that often results in lifetime banishment for minor

transgressions thus harming families, incentivizing recidivist border crossing and raising costs for all because the stakes are too high.

4. Finally, though it has not been much-discussed in this Article, the government should accept the idea that the “rule of law” extends—at least to some significant degree—beyond U.S. borders to post-removal legal claims. Especially if the current punitive post-removal bars to re-entry are not changed, then administrative and judicial review of such cases should be more transparent and better structured in order to incentivize all government actors to comply with legal constraints and to maximize both justice and fairness.<sup>125</sup>

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<sup>125</sup> See generally KANSTROOM, *supra* note 13.